

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF DEPARTMENT OF)
INSURANCE, FINANCIAL INSTITUTIONS)
AND PROFESSIONAL REGISTRATION,)
)
Petitioner,)
)
vs.)
)
JOHN M. SHAVER,)
)
Respondent.)

No. 10-2294 DI

DECISION

John M. Shaver is not subject to discipline.

Procedure

On December 13, 2010, the Director of the Department of Insurance, Financial Institutions and Professional Registration (“the Department” and “the Director”) filed a complaint seeking to discipline Shaver. On January 31, 2011, Shaver filed an answer to the complaint.¹ On July 18, 2011, we held a hearing on the complaint. Tamara W. Kopp represented the Director. Shaver represented himself. The matter became ready for our decision on November 9, 2011, the date the last written argument was due.

¹ We served a copy of the complaint and our notice of complaint/notice of hearing by certified mail. The return receipt was signed by Linda S. Shaver on January 20, 2011. By filing an answer admitting and denying paragraphs in the complaint, we consider Shaver to be on notice of the allegations against him.

Findings of Fact

1. Shaver was issued a non-resident insurance producer license on August 5, 2004. Shaver's license is inactive because it expired on August 5, 2006, and Shaver did not apply for renewal. At all relevant times, Shaver was licensed as an insurance producer in Kansas.

Shaver's License

2. Approximately sixty days before Shaver's Missouri insurance producer license expired, the Department mailed a renewal notice to Shaver.

3. Shaver's Missouri insurance producer license expired in August 2006, and he did not renew his license.

4. Shaver knew in October 2006 that he did not hold a Missouri insurance producer license and knew he was not authorized to sell, solicit, or negotiate annuity transactions in Missouri.

5. Shaver knew that he was authorized to sell, solicit, or negotiate an annuity transaction in Kansas.

The Annuity

6. In February 2006, Shaver met with James E. Ellison and Mr. Ellison's spouse, Emma Jane Ellison, to review their trust documents. Mr. and Mrs. Ellison resided in Lee's Summit, Missouri, and this meeting took place there. The Ellisons were both 84 years old. Mr. Ellison was ill, and they were concerned about Mrs. Ellison's care. Mrs. Ellison was a nurse for 33 years.

7. In September 2006, Mrs. Ellison called Shaver and said that they wanted to proceed with the annuity purchase.

8. Shaver informed Mrs. Ellison that he was no longer licensed in Missouri, but that he was licensed in Kansas. He called National Western Life Insurance Company ("National

Western”) of Austin, Texas, and Creative Marketing, CMIC, to ensure that a company would accept a Missouri resident buying an annuity product in Kansas. The companies informed him that it was acceptable practice.

9. Shaver offered to get the Ellisons an agent who could meet them in Missouri, but they refused, citing their good relationship with him. They agreed to travel to Kansas to purchase the annuity. The Ellisons went to Kansas to buy and receive the annuity because they wanted to get their financial security protected.

10. At the relevant time, Mr. Ellison did not drive. Mrs. Ellison was driving. She was in good health, and she cared for her husband full time. She could see and read and was not then on medication that altered or distorted her memory as she testified she is now.

11. Don Jenkins, who drove for the Ellisons, took them to Kansas. He denied taking them to Topeka, but said others took them places also. Members of the Ellisons’ church drove them to Kansas.

12. The Ellisons met Shaver at a Perkins restaurant on October, 4, 2006, and they filled out an application for an equity indexed annuity, the Ultra Classic, from National Western, with an initial \$200,000 deposit and the Ellisons as joint owners. The application states that it was signed in Topeka, Kansas, on October 4, 2006. This information appears right above the signature line. Both Ellisons signed the application.

13. National Western sent the policy by overnight mail to Shaver, and he received it on October 9, 2006.

14. The Ellisons met Shaver at a Denny’s restaurant off of I-435 and Metcalf Road. The Ellisons signed the delivery receipt and took the policy.

15. The Ultra Classic is an insurance product issued by National Western that features a 13-year surrender period. A surrender period requires the annuity holder to pay a percentage of the annuity contract to the insurance company if the annuity holder seeks to access the annuity

funds before the expiration of the surrender period. There is up to a 10% free withdrawal option without any surrender charges.

16. The Confirmation of Sale and Delivery form for this annuity was signed by the Ellisons on October 9, 2006. The form leaves space to write in where the policy/contract was solicited and applied for and where it will be delivered. This document states that the policy was solicited and applied for in the state of Kansas and that it will be delivered in the state of Kansas.

17. National Western paid a commission of approximately \$20,000 to Shaver for the sale of the Ultra Classic annuity to the Ellisons.

18. Approximately seven weeks after he purchased the Ultra Classic, Mr. Ellison died. Mrs. Ellison then tried to exit the Ultra Classic, but National Western would not allow Mrs. Ellison to exit the contract without realizing a double digit percentage surrender penalty.

19. Mrs. Ellison's grandchildren, who have power of attorney for her, wanted her to be relieved of her obligation from the National Western Life Annuity she purchased from Shaver. They wanted the \$200,000 in proceeds to be used for her care. Her original basis of complaint to the Director was that she was sold an annuity product that was not appropriate for someone her age and financial status.

20. The Director's investigator, Ron Harrod, contacted National Western, and the company rescinded the contract and paid Mrs. Ellison back the \$200,000. The company charged back Shaver's commission when it returned Mrs. Ellison's money.

Conclusions of Law

We have jurisdiction over this case.² The Director bears the burden of proving that Shaver's license is subject to discipline by a preponderance of the evidence, *see Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App., W.D. 2012) (dental licensing board demonstrates "cause" to discipline by showing preponderance of evidence). A preponderance of

² Section 621.045. Statutory references, unless otherwise noted, are to RSMo Supp. 2012.

the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.* at 230.

I. Credibility/Burden of Proof

This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992). When there is a direct conflict in the testimony, we must make a choice between the conflicting testimony. *Id.*

This case presents a difficult credibility determination. Only two people are able to testify as to the location of the meetings – Shaver and Mrs. Ellison. The Director identified several discrepancies in Shaver’s account of the events, including changes in his written notes and millage records. Shaver offers explanations for these discrepancies, and in any event these discrepancies do not prove that Shaver did anything *in Missouri*.

Mrs. Ellison’s complaint about the annuity ultimately led to National Western rescinding the contract and waiving all penalties at the behest of the Director’s investigator. It did so on the allegation that Shaver sold the policy out of state. Investigator Ron Harrod attributed greater weight to Mrs. Ellison’s account of the facts that substantiated her \$200,000 refund of the annuity on Mrs. Ellison’s assertion that she and her husband never went to Kansas to purchase the annuity despite the recitation on the annuity that it was signed in Topeka, Kansas, and later delivered in Kansas. There is no evidence that Mrs. Ellison suffered anything at the time of interest that would have kept that information away from her. In fact, Mrs. Ellison was alert and articulate in her deposition. Yet she inexplicably signed three times showing that the sale and delivery of the annuity was in Kansas.

Additionally Mrs. Ellison’s account of the facts now includes the basis cited by the investigator to the insurance company – that Shaver sold insurance in Missouri when he was not

licensed to do so – when her original complaint did not. There was no allegation in the Director’s complaint or proof that annuity sold was inappropriate for the Ellisons due to their age, poor health, or financial circumstances. Finally, the Ellisons attested to the policy not being sold or delivered in Missouri on a separate form. All this weighs against Mrs. Ellison’s credibility now. Either this Commission is to believe that the Ellisons were tricked into buying one annuity in Missouri by signing that they bought it in Kansas, or that they knew, but signed numerous documents to the contrary, but now want a better deal. From the demeanor of Mrs. Ellison and incongruent developments of her complaint, multiple attestations to the contrary of a Missouri sale, and finally the gain she stands to keep (\$200,000 returned without penalty), her credibility is less than that of Shaver.

Our decision in this case also rests on the burden of proof. Shaver was not required to prove that he sold the annuity in Kansas. The Director was required to prove that Shaver sold the annuity in Missouri. Based on our determination of credibility, we find that the Director failed to do this by a preponderance of the evidence. Our findings of fact reflect this failure.

II. Cause for Discipline

Section 375.014.1 provides:

No person shall sell, solicit or negotiate insurance in this state for any class or classes of insurance unless he or she is licensed for that line of authority as provided in this chapter.

Section 375.141.1 provides:

1. The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:

(2) Violating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;

(5) Intentionally misrepresenting the terms of an actual or proposed insurance contract or application for insurance;

(8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere;

(12) Knowingly acting as an insurance producer when not licensed or accepting insurance business from an individual knowing that person is not licensed[.]

Section 375.144 provides:

It is unlawful for any person, in connection with the offer, sale, solicitation or negotiation of insurance, directly or indirectly, to:

(2) As to any material fact, make or use any misrepresentation, concealment, or suppression;

(4) Engage in any act, practice, or course of business which operates as a fraud or deceit upon any person.

A. Count I

The Director argues that Shaver violated § 375.144(4), which is grounds for discipline under § 375.141.1(2). The Director failed to prove that Shaver lied about the location of the annuity sale, and thus failed to prove that Shaver engaged in a practice that operated as a fraud or deceit upon the Ellisons.

There is no cause for discipline under § 375.141.1(2) under Count I.

B. Count II

The Director argues that Shaver violated § 375.144(2), which is grounds for discipline under § 375.141.1(2). The Director failed to prove that Shaver lied about the location of the annuity sale, and thus failed to prove that Shaver made a misrepresentation, concealment or suppression of a material fact.

There is no cause for discipline under § 375.141.1(2) under Count II.

C. Count III

The Director argues that there is grounds for discipline under § 375.141.1(5). The Director failed to prove that Shaver lied about the location of the annuity sale, and thus failed to prove that Shaver intentionally misrepresented terms on an insurance contract or application for insurance.

There is no cause for discipline under § 375.141.1(5) under Count III.

D. Count IV

The Director argues that Shaver engaged in the sale, solicitation or negotiation of insurance without a license in violation of § 375.014, which is grounds for discipline under § 375.141.1(2). The Director failed to prove that Shaver engaged in the sale, solicitation or negotiation of insurance in Missouri when he did not have a Missouri license.

There is no cause for discipline under § 375.141.1(2).

E. Count V

The Director argues that Shaver accepted a commission, service fee, brokerage, or other valuable consideration for the selling, soliciting, or negotiating of insurance in this state when he was required to be licensed and when he was not licensed in violation of § 375.076.2, and that this is a ground to discipline Shaver's Missouri insurance producer license under § 375.141.1(2).

Section 375.076.2 provides:

A person shall not accept a commission, service fee, brokerage or other valuable consideration for selling, soliciting or negotiating insurance in this state if that person is required to be licensed and is not so licensed.

Shaver accepted a commission from National Western for the sale of an Ultra Classic annuity.

But the Director failed to prove that he did so for selling, soliciting or negotiating insurance in Missouri.

There is no cause for discipline under § 375.141.1(2).

F. Count VI

We have found that Shaver did not act as an insurance producer in Missouri when not licensed to do so. There is no cause for discipline under § 375.141.1(12).

G. Count VII

The Director argues that Shaver used dishonest practices and demonstrated untrustworthiness in the conduct of business. The Director failed to prove this allegation, and there is no cause for discipline under § 375.141.1(8).

Summary

Shaver is not subject to discipline.

SO ORDERED on June 27, 2013.

\s\ Nimrod T. Chapel, Jr.
NIMROD T. CHAPEL, JR.
Commissioner